SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

No. 1163

October Term, 1968

IN THE SUPREME COURT OF THE

UNITED STATES

Frank Smith, Petitioner

v.

United States of America

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Fifth Circuit

Petitioner's Reply To The "Memorandum For The United States In Opposition"

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For The United States In Opposition"

Comes Frank Smith, still insisting on his Petition for a Writ of Certiorari on file herein and without waiving said petition, files this pleading directed to the facts, and says that surely without the intention to do so but nevertheless with the certainty of its accomplishment, the Government, in its "Memorandum For The United States In Opposition" misstated some facts, to wit:

1. At page 5 of the Government's "Memorandum For The United States In Opposition", it is stated in paragraph 4 thereof that petitioner is not charged in Count 2 of the indictment. Whereas this petitioner, Frank Smith, does stand charged in Count 2 as an aider and abetter of a substantive Dyer Act violation involving a "1966 Pontiac".

2. In the same paragraph 4 at page 5 of the Government's "Memorandum For The United States In Opposition" it is stated that, "The stolen 1966 Pontiac whose transportation in interstate commerce petitioner was convicted of having aided and abetted was identified by the proof." This, too, is a misstatement of fact. The testimony shows that Louis Del Branton, the person charged in Count 4 with having made the actual transportation of the stolen "1966 Pontiac" drove a stolen 1966 Pontiac Bonneville part of the way in interstate commerce, and drove a stolen 1966 Pontiac Catalina part of the way on this same trip in interstate commerce. The jury could have convicted petitioner Smith of aiding and abetting on the 1966 Catalina or on the 1966 Bonneville but not on both. Smith, the petitioner, cannot prove which 1966 Pontiac he was convicted on and neither can the Government because the Trial Court

denied petitioner Smith's Application for a Bill of Particulars.

3. The Government in its Memorandum at page 4-5, failed to set out the prejudicial memorandum contained in Government's Exhibit #5 en toto. It is set out fully at page 152 of the Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit.

4. At page 4, paragraph 2, the Government, in its Memorandum in Opposition, states that; "The jury, however, did not seek a copy of the Court's charge." Whereas, the jury did, however, request the written or printed definition of conspiracy.

5. In paragraph 1, page 3, of the Government's Memorandum in Opposition it is stated that Petitioner contends that he was convicted on charges different from those contained in the indictment. This, the Government's Memorandum states, "is based on allegations (a) that the trial judge improperly 'amended' the indictment by granting the government's motion to dismiss counts 2 and 5 . . .". This only partially states petitioner's contention as to the dismissal of counts 2 and 5, the most important part of petitioner's contention herein, referring to the striking of two overt

acts charged in Count 1 of the indictment and described in Counts 2 and 5. All as more fully explained in this petitioner's Petition For Writ of Certiorari in question 32 and in Reason Two.

6. At page 1-2 in footnote 1 of the Government's Memorandum, it is stated that "A co-defendant, Gurleski, whose conviction was likewise affirmed by the Court in the same opinion, has filed a separate petition for certiorari, No. 1559 Misc., this Term, raising different issues from those presented here." Whereas, at page 31a of petitioner Frank Smith's Petition For a Writ of Certiorari in QUESTION THIRTY THREE, it is stated ". . . Petitioner, Frank Smith, adopts and incorporates the questions on unreasonable search and seizure raised by Michael Joseph Gurleski in his said petition for certiorari now pending in this Supreme Court of the United States."

Wherefore, premises considered, petitioner, Frank Smith, continues to pray that a writ of certiorrari will be granted in his case, to the end that justice be done and he receive a new trial.

Respectfully submitted,

Robert Everett L. Looney
Attorney For Frank Smith
5405 Schumacher
Houston, Texas 77027

Certificate Of Service

I, Robert Everett L. Looney, attorney for Frank Smith, petitioner, do hereby certify that three copies of the foregoing corrected statement of facts has been served on the Solicitor General at his office in Washington, D.C. at the Department of Justice by placing same in the United States mail with sufficient Air Mail postage affixed to go First Class Air Mail.

Robert Everett L. Looney
5405 Schumacher
Houston, Texas 77027

PETITION FOR REHEARING

SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
AUG 4 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1163

FRANK SMITH,

Petitioner

versus

UNITED STATES OF AMERICA

Respondent

PETITION FOR REHEARING OF THE COURT'S ORDER DENYING PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 1163

FRANK SMITH,

Petitioner

versus

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR REHEARING OF THE COURT'S ORDER DENYING PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Frank Smith, prays for a rehearing of this Court's order denying his petition for a writ of certiorari, said denial having been issued on June 23, 1969; an extension of time to and through August 1, 1969, and then through Aug. 8, 1969, within which to file petitioner's petition for rehearing, having been ordered by Associate Justice Thurgood Marshall on the 18th day of July,

and on August 1, 1969, 1969, after application for such extension from petitioner's counsel.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

United States Constitution, Amendment VI, which reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis of pertinent part ours).

United States Constitution, Amendment V, which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person

be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."
(Emphasis of pertinent part ours).

United States Constitution, Article III, Sec. 2, Clause 3 provides in part:

"The Trial of all crimes, except in cases of impeachment, shall be by Jury * * * "

The Acts of Congress involved are:

Rules of Crim. Proc., Title 18, U.S.C.A.,

Rule 23, provides:

Rule 23 - Trial by Jury * * *

(a) Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the Court and the consent of the government.
(b) Jury of less than Twelve. Juries shall be of twelve but at any time before verdict the parties may stipulate in writing with the approval of the Court that the jury shall consist of any number less than twelve.
(c) * * *

GROUNDS FOR REHEARING

GROUND NUMBER ONE

Although petitioner did not waive his right to trial by a jury of twelve legally constituted jurors; and although petitioner did not stipulate with the government prosecutors or agree with the trial Judge nor agree with the government prosecutors to be tried by a jury of less than twelve legally constituted jurors; nevertheless, the official transcript of the proceedings, as certified to by Harry L. Wear, the official Court Reporter for the United States District Court For The Western District of Texas, Austin Division, is certified ". . . as being a true and complete transcript of the proceedings. . . " and reflects that out of the twelve jurors legally selected, impaneled and sworn in as such at the beginning of the trial, that only ten of

such jurors returned the verdict of guilty against this petitioner, and that two persons, one Juan Falcon and one Frank Marshall Offing, after the verdict was returned, stood up when the trial Judge polled the jury by their individual names, and answered that their verdict was guilty as to this petitioner, Frank Smith, as well as all other co-defendants. Whereas, the said Juan Falcon and the said Frank Marshall Offing, the official transcript reflects, are not listed either among the twelve legally sworn in jurors or among the two legally sworn in alternates who took their seats in the jury box before the trial began. The official certified record also reflects that two of the original and legally sworn in jurors, one Morris Olguin, Jr., and one E. C. Rather, were not polled by the trial Judge as to their verdict and that they made no

answer. At no place in the official certified transcript is there any record that the said Morris Olguin, Jr. and the said E. C. Rather were ever dismissed or discharged from their duties as officially selected, impaneled and sworn jurors under duty to listen to the evidence, the arguments, the Court's charge, deliberate together with the other jurors and return a verdict of guilt or innocence at petitioner's trial.

a. Such facts as above outlined were first discovered by petitioner's attorney's on July 21, 1969, and were first known to petitioner when informed by his attorneys of such on the morning of July 22, 1969. Such facts as above stated amount to grounds for a rehearing since they are intervening circumstances of substantial and controlling effect.

b. Such bizarre, unusual, illegal, shocking and unconstitutional circumstances raise a serious and substantial federal question since they amount to a denial to petitioner of a trial by a jury as guaranteed him by the United States Constitution, Amendment VI, and a denial to petitioner of his rights to be deprived of his liberty, if at all, only by due process of law, as guaranteed to him by the United States Constitution, Amendment V, and by the Acts of Congress that guarantee trial by a jury of twelve legally constituted and sworn jurors, unless such Constitutional right to a jury be waived by the accused in writing. For a trial by only ten legally constituted and sworn jurors is no jury trial at all, and any verdict rendered by such a jury, whether it be guilty or whether it be innocent, is void ab initio. Such a jury verdict further denies

petitioner a fair and impartial trial as guaranteed him by the United States Constitution.

c. This ground for rehearing is such a substantial, fundamental, and prejudicial violation of petitioner's Constitutional and statutory rights, so damaging to our system of justice; and judicial procedures, and is of such wide and general import to the general welfare and sense of security of the populace in our judicial system, procedure and the people's necessary belief in basic Constitutional guarantees, that this ground for rehearing should be noticed, heard, and ruled on, even though presented for review for the first time at this late hour of a Motion for Rehearing after denial of writ of certiorari. For this is plain, fundamental and basic error of the most serious nature, that should not

be allowed to step one inch inside the door of precedent and judicial procedure.

d. Such a verdict, as arrived at in this case, if allowed to stand, is in conflict with every decision and opinion of this Supreme Court heretofore rendered regarding the right to trial by a jury composed of twelve duly and legally constituted jurors, rather than a lesser number.

e. Please refer to Appendice "A" attached to this petition for rehearing showing a copy of the pages of the official and certified transcript of the trial proceedings wherein the twelve legally constituted jurors, along with the two legal alternates were properly and legally empaneled and sworn.

f. Please refer to Appendice "B" attached to this petition for rehearing, showing a copy of the pages of the

official and certified transcript of the trial proceedings wherein the purported jury, listing two illegal jurors along with ten legal jurors, were individually polled by name by the trial judge and acknowledged their purported and void verdict of guilty against this petitioner, Frank Smith.

g. Please refer to Appendice "C" attached to this petition for rehearing showing a copy of the page in the official transcript of the trial proceedings, wherein the official Court Reporter, Harry L. Wear, certifies the transcript as being ". . . a true and complete transcript of the proceedings . . . " in the trial Court.

GROUND NUMBER TWO

That the Trial Court committed substantial error in refusing to permit

Counsel for the Defendant, Frank Smith, to fully make his objections to the Court's Third charge to the Jury, in the presence of the Jury and before the Jury retired to deliberate. (See Transcript of the proceedings and of the Evidence, Volume 111 at pages 1345 through 1349, both inclusive. Appeals page 1958 through 1962. Also see Butler VS. United States, No. 10582, United States Court of Appeals District of Columbia Circuit, 188 Federal Reporter 2nd Series, 24 through 27, at page 26 and 27. Also Point 47 of Appellant's First Supplemental Brief.

GROUND NUMBER THREE

That the Court Committed Substantial Error in failing to grant Defendant's, Frank Smith, Motion for Mistrial for refusing to grant Defendant's Counsel's right to fully make his objections to the Trial Court's Third Charge to the Jury,

in the presence of the Jury and before the Jury was retired to deliberate. (See Transcript of the proceedings and of the Evidence, Volume 111 at page 1349. Appeals page 1962. Also Point 47 of the Appellants First Supplemental Brief).

SEE ALSO THE PER CURIAM OPINION before the United States Court of Appeals for the Fifth Circuit, on petition for rehearing En Banc, wherein the Court said, "Upon reconsideration of all briefs received by the Court on behalf of appellant, Frank Smith, and a review of all briefs of Smith's appealing co-defendants, we are of the view that the case has been correctly decided.

. . . . . ."

[redacted]

As to Grounds 2 and 3 above, said Opinion of the United States Court of Appeals for the Fifth Circuit in affirming Petitioner's convictions is contrary to the decision and opinion in Butler vs. United States, No. 10582, United States Court of Appeals District of Columbia Circuit, 188 Federal Reporter 2nd Series, 24 through 27, at page 26 and 27, and the great weight of established authority in the other circuits as well as being a denial of due process of law as guaranteed by the United States Constitution, Fifth Amendment, and the Acts of Congress, as well as being a denial of a fair and impartial trial as guaranteed by the Acts of Congress and the United States Constitution. Further, said Grounds 2 and 3 present a substantial federal question as it involves the violation of long established judicial procedure.

WHEREFORE, premises considered, Petitioner prays that this petition for rehearing be in all things and matters granted, and that Petitioner's Petition

for Writ of Certiorari be granted as prayed for in his Original Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted and So Petitioned:

Robert Everett L. Looney
3817 Richmond Avenue, Suite 108
Houston, Texas 77027
Phone 668-8146, Area Code 713

I, Robert Everett L. Looney, Attorney for Frank Smith, Petitioner, do hereby certify that this petition for rehearing is presented in good faith and not for delay, and that the petition is restricted to intervening circumstances of substantial and controlling effect, or to other substantial grounds available to Petitioner although not previously presented.

Robert Everett L. Looney

SUBSCRIBED TO AND SWORN to by the said Robert Everett L. Looney by me on this the _____ day of _____, 1969.

To certify which witness my hand and seal of office on this the _____ day of _____, 1969.

_____
Notary Public in and for
Travis County, Texas

I, Robert Everett L. Looney, Attorney for Frank Smith, do hereby certify that a copy of said petition for rehearing has been air mailed to the Solicitor General of the United States, Department of Justice, Washington, D. C.

_____
Robert Everett L. Looney

SUBSCRIBED TO AND SWORN to by the said Robert Everett L. Looney by me on this the _____ day of _____, 1969.

To certify which witness my hand and seal of office on this the _____ day of _____, 1969.

_____
Notary Public in and for
Travis County, Texas

APPENDIX A

Page 70 through 73 of
The Official Transcript
Of The Trial Proceedings

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". . . that? The last four.

MR. JEFFERSON: Each side gets one strike. There are four.

THE COURT: Right.

MR. JEFFERSON: And theirs have to be exercised as a group.

THE COURT: Do you understand?

MR. LOONEY: Explain me that.

THE COURT: The last four names on the jury list will constitute the panel of alternates, from which two will be selected.

MRS. MILLER: I have a letter from my doctor saying he advised me not to serve because of a heart condition.

THE COURT: Mrs. Love?

MRS. MILLER: Miller now.

THE COURT: Where is Mrs. Miller's name on this list?

MR. JEFFERSON: Fifteen.

THE COURT: All the attorneys: Is there any objection to excusing No. 15, Mrs. Miller, because of the statement she just made?

MR. JEFFERSON: None from the Government.

THE COURT: Any from the defense, any objection? If there is, let's hear it. All right. Be at

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ease until the list is stricken.

(At 11:20 A.M. counsel
(left the courtroom.

(At 12:00 noon, pro-
(ceedings were had,
(as follows:

MR. SHROPSHIRE: Your Honor, may we confer with counsel?

THE COURT: That can keep till recess time. Let's get the lists filed.

(Lists are handed to
(the Clerk.)

THE COURT: As your names are called, please come around and have seats in the jury box, beginning on the front row.

MR. HART: No. 1, Alex Guerra. No. 3, Allen C. Clark. No. 10, Albert L. Gore, Jr. No. 17, George D. Van Houten. No. 18, Clarence Eckols. No. 19, Aubrey LaVaughn Perry. No. 21, Clarence Collins Cobb. No. 24, Arthur Boone. No. 25, James Ronald Arbuckle. No. 29, Marvin L. Brown, Jr. No. 31, E. C. Rather. No. 33, Morris Olguin, Jr. Number one alternate, No. 49, Horace E. Willis. Number two alternate, No. 50, Fred D. Mann, Sr.

(Jurors are seated in
(jury box.)

THE COURT: Will you gentlemen of the jury please stand and raise your right hands and be sworn as jurors in this case.

(Mr. Hart then adminis-
(tered the oath to the
(jurors.

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THE COURT: Members of the jury, you have been selected from this jury panel as jurors in this case. You won't be locked up at nighttime, but let me give you some instructions which I will ask you to bear in mind at all times during the course of this trial.

At all times when you are away from the jury box during recess, which normally

will be one recess period in the morning and one in the afternoon, and of course you will be in recess overnight. Do not discuss among yourselves or with anyone else, or allow to be discussed in your presence, anything about this case until such time as you have heard all the testimony, the arguments of counsel, and the charge of the Court, and have retired to the jury room to deliberate your verdict. During the recess time when you are away from the jury box during the course of this trial, do not carry on any conversation with anyone in the hallway, any witnesses, or any of the attorneys in the case. They understand the rules require you to hold yourselves aloof and apart from them, and of course you are expected to do that. If anyone at all approaches you or tries to talk to you about this case in any way, shape, form, or fashion, be sure and report it to the Court immediately.

This jury now has been impaneled and sworn.

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You will be excused at this time and be in recess until next Monday morning at 9:30; that is Monday morning, September 11, next Monday morning, be back here at 9:30. Please take note of the seats that you occupy now in the jury box and occupy that same seat throughout the entire course of the trial. This jury is excused until next Monday morning at 9:30.

All the remaining jurors on this panel are excused at this time until Monday, September 18, at 9:30. Be back at that time.

The hearing on the motions in this case will be resumed at 2:00 o'clock; be recessed till 2:00 o'clock.

(Court then recessed
(at 12:25 P.M. until
(2:00 P.M. September 6,
(1967, at which time
(further proceedings
(were had before the
(Court, as follows:

THE COURT: All right. Let's continue with the motions.

MR. LOONEY: If it please the Court, Your Honor, the defendant, Frank Smith, has, among other motions, a motion in limine, where we are seeking to have the Government's attorneys limited in their examination of any witnesses in regard to any matters as to whether or not the defendant Frank Smith has ever been convicted of a felony. We have as our grounds for that, that any

APPENDIX B

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(Whereupon the jury
(returned into the
(courtroom, and the
(following proceedings
(took place:

THE COURT: Members of the jury, have you reached a verdict?

THE FOREMAN: We have, Your honor.

THE COURT: May I see it, please? I will ask the clerk to read the verdict of the jury.

THE CLERK: (Reading) "United States of America versus Charles Garner, Ellis Woods, Frank Smith, Michael Joseph Gurleski and Dorothy Villa-Franca, the verdict of the jury:

"We, the jury, find the defendant, Charles Garner, guilty as charged in the first count of the indictment, guilty as charged in the third count, and guilty as charged in the fourth count.

"We, the jury, find the defendant, Ellis Woods, guilty as charged in the first count of the indictment, guilty as charged in the fourth count.

"We, the jury, find the defendant, Frank Smith, guilty as charged in the first count of the indictment; not guilty as charged in the third count, and guilty as charged in the fourth count.

"We, the jury, find the defendant, Michael Joseph Gurleski, guilty as charged in the first count of

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the indictment, guilty as charged in the third count, and guilty as charged in the fourth count.

"We, the jury, find the defendant, Dorothy Villa-Franca, guilty as charged in the first count of the indictment, guilty as charged in the third count, and guilty as charged in the fourth count.

"Dated September 20, 1967, Arthur Boone, Foreman."

THE COURT: Members of the jury, is that your verdict? So say you each and all?

The verdict is ordered received and filed as a part of the record in this cause. Anything further at this time?

MR. JEFFERSON: Nothing from the Government, Your Honor.

MR. LOONEY: If the Court please, can we have the jury polled individually?

THE COURT: Yes, sir, you sure can. Let me have that jury chart.

As I call your name, members of the jury, will you please rise, and I will ask you a question, and you can answer it. Mr. Horace Wiley -- I can't read this writing. Give me one that I can read, will you?

Mr. Aubrey Perry.

MR. PERRY: Yes, sir.

THE COURT. Mr. Perry, is the verdict that you have

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just heard read your verdict as to each of the defendants, Charles Garner?

Mr. PERRY: It is, sir.

THE COURT: Ellis Woods?

MR. PERRY: It is, sir.
THE COURT: Frank Smith?
MR. PERRY: It is, sir.
THE COURT: Michael Gurleski?
MR. PERRY: It is, sir.
THE COURT: And Dorothy Villa-Franca?
MR. PERRY: It is, sir.
THE COURT: Mr. Echols, is the verdict you have just heard read by the clerk your verdict as to the defendant, or defendants, Charles Garner?
MR. ECHOLS: It is, sir.
THE COURT: Ellis Woods?
MR. ECHOLS: It is, sir.
THE COURT: Frank Smith?
MR. ECHOLS: It is, sir.
THE COURT: Michael Joseph Gurleski?
MR. ECHOLS: It is, sir.
THE COURT: And Dorothy Villa-Franca?
MR. ECHOLS: It is, sir.
THE COURT: Mr. VanHoove, is the verdict you have just heard read, is that your verdict as to the defendants,

Charles Garner?
MR. VANHOOVE: It is, sir.
THE COURT: Ellis Woods?
MR. VANHOOVE: It is, sir.
THE COURT: Frank Smith?
MR. VANHOOVE: It is, sir.
THE COURT: Michael Joseph Gurleski?
MR. VANHOOVE: It is, sir.
THE COURT: And Dorothy Villa-Franca?
MR. VANHOOVE: It is, sir.
THE COURT: Mr. Albert Gore, Jr., is the verdict you have just heard read

your verdict with reference to the defendants in this case, Charles Garner?

MR. GORE: Yes, sir.
THE COURT: Ellis Woods?
MR. GORE: Yes, sir.
THE COURT: Frank Smith?
MR. GORE: Yes, sir.
THE COURT: Michael Gurleski?
MR. GORE: Yes, sir.
THE COURT: And Dorothy Villa-Franca?
MR. GORE: Yes, sir.
THE COURT: Mr. Allen Clark, is the verdict you heard read by the Clerk your verdict with reference to the defendants, Charles Garner?

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MR. CLARK: It is.
THE COURT: Ellis Woods?
MR. CLARK: It is.
THE COURT: Frank Smith?
MR. CLARK: It is.
THE COURT: Michael Gurleski?
MR. CLARK: It is.
THE COURT: And Dorothy Villa-Franca?
MR. CLARK: It is.
THE COURT: All right, sir, Mr. Guerrera, is the verdict you heard the clerk read your verdict with reference to the defendants, Charles Garner?
MR. GUERRERA: Yes, sir.
THE COURT: Ellis Woods?
MR. GUERRERA: Yes, sir.
THE COURT: Frank Smith?
MR. GUERRERA: Yes, sir.
THE COURT: Michael Gurleski?
MR. GUERRERA: Yes, sir.

THE COURT: And Dorothy Villa-Franca?

MR. GUERRERA: Yes, sir.

THE COURT: All right, sir, Mr. Frank Marshall Offing, you heard the verdict. Is that your verdict as to the defendants in this case, Charles Garner?

MR. OFFING: Yes, sir.

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THE COURT: Ellis Woods?

MR. OFFING: Yes, sir.

THE COURT: Frank Smith?

MR. OFFING: Yes, sir.

THE COURT: Michael Gurleski?

MR. OFFING: Yes, sir.

THE COURT: And Dorothy Villa-Franca?

MR. OFFING: Yes, sir.

THE COURT: Mr. Juan Falcon, you heard the verdict read. Is that your verdict with reference to the defendants in this case, Charles Garner?

MR. FALCON: Yes, sir.

THE COURT: Ellis Woods?

MR. FALCON: Yes, sir.

THE COURT: Frank Smith?

MR. FALCON: Yes, Your Honor.

THE COURT: Michael Gurleski?

MR. FALCON: Yes, Your Honor.

THE COURT: And Dorothy Villa-Franca?

MR. FALCON: Yes, Your Honor.

THE COURT: Mr. Marvin L. Brown, you heard the verdict read by the clerk. Is that your verdict with reference to the defendants, Charles Garner?

MR. BROWN: Yes, sir.

THE COURT: Ellis Woods?

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MR. BROWN: Yes, sir.
THE COURT: Frank Smith?
MR. BROWN: Yes, sir.
THE COURT: Michael Gurleski?
MR. BROWN: Yes, sir.
THE COURT: Dorothy Villa-Franca?
MR. BROWN: Yes, sir.
THE COURT: Mr. James Arbuckle, the verdict you heard the clerk read in this case a few moments ago, is that your verdict with reference to the defendants in this case, Charles Garner?
MR. ARBUCKLE: Yes, sir.
THE COURT: Ellis Woods?
MR. ARBUCKLE: Yes, sir.
THE COURT: Frank Smith?
MR. ARBUCKLE: Yes, sir.
THE COURT: Michael Gurleski?
MR. ARBUCKLE: Yes, sir.
THE COURT: And Dorothy Villa-Franca?
MR. ARBUCKLE: Yes, sir.
THE COURT: All right sir, Mr. Boone, you heard the verdict read by the clerk. Is that your verdict with reference to the defendants in this case, Charles Garner?
MR. BOONE: Yes, sir.
THE COURT: Ellis Woods?

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MR. BOONE: Yes, sir.
THE COURT: Frank Smith?
MR. BOONE: Yes, sir.
THE COURT: Michael Gurleski?
MR. BOONE: Yes, sir.
THE COURT: And Dorothy Villa-Franca?
MR. BOONE: Yes, sir.

THE COURT: All right, sir, Mr. Clarence Cobb, you heard the verdict read. Is that your verdict as regards to the defendants in this case, Charles Garner?

MR. COBB: Yes, sir.

THE COURT: Ellis Woods?

MR. COBB: Yes, sir.

THE COURT: Frank Smith?

MR. COBB: Yes, sir.

THE COURT: Michael Gurleski?

MR. COBB: Yes, sir.

THE COURT: And Dorothy Villa-Franca?

MR. COBB: Yes, sir.

THE COURT: All right, anything further? Are all of the defendants on bond at this time?

MR. JEFFERSON: I believe Mr. Gurleski is not, Your Honor. The others are.

THE COURT: Does the Government have any objection to continuing the bond?

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MR. JEFFERSON: Until the date they are sentenced, we would not have any objection.

THE COURT: All right, the bonds that are now outstanding will be allowed to remain outstanding or in force until September 28. Does that date give you enough time, Mr. Gurleski?

MR. GURLESKI: Yes, sir, I believe it does, sir.

THE COURT: September 28 at 9:30 a.m. -- or, let's reset that for 9:00, and we will get to it soon. It will probably be some time after 9:00, let's set it as near 9:00 as we can. Let's say 9:00 o'clock on September 28 for sentencing, be back at that time.

The jury is excused at this time until next Monday morning, September 25, 9:30 a.m.

END OF TRIAL

- - - - -

APPENDIX C

Page 1364 of the Official Transcript
Of The Trial Proceedings

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REPORTER'S CERTIFICATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

I, Harry L. Wear, Official Reporter for the United States District Court, Western District of Texas, Austin Division, do hereby certify that the foregoing on pages 1 through 1368 of this record is a true and complete transcript of the proceedings had and evidence introduced upon the trial of the cause styled UNITED STATES OF AMERICA VS. CHARLES GARNER, ELLIS WOODS, FRANK SMITH, LOUIS DELL BRANTON, MICHAEL JOSEPH GURLESKI, DONALD RAY CHILDRESS, DOROTHY VILLA-FRANCA, WILLIAM BADGER AND JAMES ALFORD BOYD, CR. NO. 67-28-A, which proceedings were had beginning on the 12th day of June, 1967, in the Austin Division of said Court, except that the exhibits which were introduced in evidence have been omitted from this transcript and are a part of the record in the Office of the Clerk of the United States District Court for the Western District of Texas, Austin Division.

I further certify that this transcript has been prepared at the request of the defendants, Frank Smith, Dorothy Villa-Franca and Michael Joseph Gurleski, for the purpose of an appeal from the judgment entered herein.

WITNESS MY OFFICIAL SIGNATURE in the City of Austin, Texas, this 7th day December, 1967.

/S/ Harry L. Wear
Harry L. Wear, Official Reporter,
United States District Court,
Western District of Texas,
Austin Division

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk

By: /S/ W. E. Lyons
Deputy.

APPENDIX D

Pages 1345 through 1349 of
The Official Transcript
Of The Trial Proceedings

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(Whereupon the jury,
(having deliberated in
(the above captioned
(cause, returned into
(the courtroom, and the
(following proceedings
(took place:

THE COURT: Members of the jury, you will recall that in the Charge in this case, you were instructed, among other things, as follows: "This Charge will be given orally, so listen carefully to what I am about to say, because you will not have a written Charge in the jury room with you. Under the federal practice, the written charge is not sent into the jury room with the jury when they are retired to deliberate their verdict, under the usual procedures".

This morning, you have sent me a note which says, "May we have the printed definition of conspiracy again"?

Now, that conspiracy definition was given to you in the original reading of the Charge, and yesterday afternoon, again, when you appeared here in court. Obviously, from having sent these requests out and specifying only that the jury was interested in the definition of conspiracy, I feel that it is my duty to give you some elaboration or definition of conspiracy that is a lawful and legal definition of conspiracy, and I want to ask you to listen to it carefully, in the hope that it will help you in the deliberations on your verdict in

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this case.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. While it involves an agreement to violate the law, it is not necessary that the persons charged met together and entered into an express or formal agreement, or that they stated in words or writing what the scheme was or how it would be effected.

It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful act. Such agreement may be inferred from the circumstances and the conduct of the party, since ordinarily a conspiracy is characterized by secrecy.

In determining whether a conspiracy existed, the jury should consider the actions and declaration of all of the alleged participants; however, in determining whether a particular defendant was a member of the conspiracy, if any, the jury should consider only his acts and statements. He cannot be bound by the acts or declaration of other participants until it is established that a conspiracy existed and that he was one of its members.

To be a member of the conspiracy, a defendant need not know all of the other members nor all of the details of the conspiracy, nor the means by which the objects were to be accomplished. Each member of the

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conspiracy may perform separate and distinct acts.

It is necessary, however, that the Government prove beyond a reasonable doubt that a defendant was aware of a common purpose and was a willing participant, with the intent to advance the purpose of the conspiracy.

The extent of a defendant's participation is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he plays a minor part in the conspiracy. His financial stake, if any, in the venture is a factor to be considered in determining whether a conspiracy existed and whether a defendant was a member of it.

If it is established beyond a reasonable doubt that a conspiracy existed and that a defendant was one of its members, then the act and declaration of any other member of such conspiracy in or out of such defendant's presence done in furtherance of the objects of the conspiracy and during its existence may be considered as evidence against such defendant.

When persons enter into an agreement for an unlawful purpose, they become agents for one another. However, statements of any conspirator which are not in furtherance of the conspiracy or made before its existence, or after its termination, may be considered as evidence only against the person making them. It is not necessary

that all of the overt acts charged in the indictment were performed. One overt act is sufficient.

An overt act means any act committed by one or more of the conspirators to

accomplish a purpose of the conspiracy. It need not be in violation of the law, and the other conspirators need not join in it or even know about it. It is necessary only that such act be in furtherance of the purpose or objects of the conspiracy.

If the jury finds beyond a reasonable doubt that a conspiracy existed as charged in the indictment and that during the existence of the conspiracy, one of the overt acts alleged was knowingly done by one or more of the conspirators in furtherance of some object of the conspiracy, proof of the conspiracy offense is then complete. It is complete as to each defendant found by the jury beyond a reasonable doubt to have been knowingly and willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators committed the overt act.

You may now retire to the jury room and resume your deliberations.

MR. LOONEY: May I address the Court? If the Court please, Your Honor, for the defendant, Smith, renews his objections.

THE COURT: That is already in the record, the same

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objection you have already made?

MR. LOONEY: Same objection, Judge, and ask now that a different definition and instruction as to what amounts to conspiracy has been given after the jury has been in actual deliberation for some . . .

THE COURT: That is all in the record,

Mr. Looney.

MR. LOONEY: Yes. Well, I want to ask for a mistrial.

THE COURT: That is overruled; that is overruled.

(Whereupon the jury
(retired from the
(courtroom to resume
(deliverations.

CERTIFICATE OF SERVICE

I, Robert Everett L. Looney, attorney for Frank Smith, petitioner, for and in behalf of Frank Smith, do hereby certify that copies of this petition for rehearing of petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit have been sent first class to Assistant United States Attorney, Reese Harrison, Jr., Federal Building, San Antonio, Texas.

Robert Everett L. Looney